IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

APPEAL FROM ORDER No 241 of 2003

WITH

CIVIL APPLICATION No 5083 of 2003

For Approval and Signature:

HON'BLE MR.JUSTICE K.A.PUJ

==========

1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

PATEL RAJNIKANT DHULABHAI

Versus

PATEL CHANDRAKANT DHULABHAI

Appearance:

1. Appeal from Order No. 241 of 2003

MR AJ PATEL for Petitioner No. 1-2

MR MC BHATT for Respondent No. 1

MR HJ NANAVATI for Respondent No. 2

RULE SERVED for Respondent No. 3

MR AB MUNSHI for Respondent No. 4-5

CORAM : HON'BLE MR.JUSTICE K.A.PUJ

Date of decision: 26/03/2004

ORAL JUDGEMENT

This Appeal From Order is filed against the order passed by the learned 4th Joint Civil Judge (S.D.), Vadodara on 27.06.2003 below an application Exh.5 in Special Civil Suit No. 605/2003 whereby the interim relief prayed for by the original plaintiffs was refused.

2. It is the case of the appellants - original plaintiffs that one Chandulal Mulji Parikh and deceased Dhulabhai, father of the appellants had purchased a land bearing Survey Nos. 459/2, 464, 465, 466/1, 466/2, in all admeasuring Acre 6.19 Gunthas of village Atladra, Tal. & Dist. Baroda from one Parvatibai Ingle, by Regd. Sale Deed dated 29.03.1961. Though the property was purchased by deceased Dhulabhai Patel and though the consideration was paid by him from the fund of his Hindu Undivided Family, the name of respondent No.1 i.e. Chandrakant Dhulabhai was shown as the purchaser of the said property along Shri Chandulal Muljibhai Parikh as the respondent No.1 was the eldest son of deceased Dhulabhai Patel and the present appellants and the respondent Nos.4 & 5 were minors at the relevant time. It is the say of the appellants that the respondent No.1 was, at the relevant time, prosecuting his studies in the college and was not having any source of income whatsoever and it is only for the sake of convenience, the name of the respondent No.1 was shown in the Sale Deed as a purchaser of the said property along with the name of Shri Chandulal Muljibhai Parikh. It is also the say of the appellants that the amount of consideration was paid by the deceased Dhulabhai and in this view of the matter, the suit property was purchased from the funds of the Hindu Undivided Family and, therefore, it constituted a H.U.F. Property.

3. It is also the say of the appellants that no partition of the ancestral properties was ever taken place either during the life time of the deceased Dhulabhai or subsequent thereto and, therefore, all the properties of the HUF continued to be the HUF properties all throughout. This HUF properties were managed by Dhulabhai and on his death on 02.10.1986, the respondent No.1 used to manage all the said properties.

4. It is also the say of the appellants that on 25.05.1990, a memorandum of understanding was arrived at between the respondent No.1 and heirs of deceased Chandulal Muljibhai Parikh, in whose names, the said property was purchased. As per the said memorandum of

understanding, it was agreed that by treating the land of all the aforesaid Survey Numbers, as having been consolidated into one compact block, partition towards western side was to be treated as the property of respondent No.1 and partition towards eastern side was to be treated as the property of the heirs of deceased Chandulal Muljibhai Parikh, as shown in the map attached to the said memorandum of understanding.

5. It is also the say of the appellants that thereafter on 18.01.1998, behind the back of the appellants and the respondent Nos.4 & 5, the respondent No.1 and members of his family executed an agreement to sell the land which came to the share of the HUF as per the memorandum of understanding, to the respondent Nos.2 & 3. After execution of this agreement to sale, the respondent No.1, in collusion with the respondent Nos.2 & 3 filed Special Civil Suit No. 311 of 1999 in the Court of learned Joint Civil Judge (S.D.), Baroda for specific performance of the agreement dated 18.01.1998. According to the appellants, the said suit was a collusive suit and was filed only with a view to deprive the appellants and respondent Nos.4 & 5 of their legitimate share in the said property. After filing of the said suit, within a period of 20 days, a consent decree was obtained in the said suit on 21.04.1999. It is appellants' grievance that the respondent Nos.2 & 3 knew about the fact that the appellants and the respondent Nos.4 & 5 were Co-owners of the said property and yet they were not impleaded as party - defendants in the said suit.

6. On coming to know about the aforesaid consent decree obtained by respondent No.1 in collusion with the respondent Nos.2 & 3, the appellants filed Special Civil Suit No. 605 of 2002 in the Court of Civil Judge (S.D.), Baroda for a partition of the suit property and separate possession of the suit property coming to their share, and for a permanent injunction restraining the respondent Nos.1 to 3 from putting up any construction on the suit property either directly or through others and from dealing with the suit property either by selling, mortgaging, gift or in any other manner whatsoever in favour of the third party. The appellants have also filed an application Exh.5 for an interim injunction restraining the respondent Nos.1 to 3 from putting up construction of any kind on the suit land and from dealing with the said property either by sale, mortgage, gift or in any other manner in favour of a third party, during the pendency of the said suit.

7. In support of the claim of the appellants that

the suit property continued to be the HUF property and the appellants and respondent Nos.4 & 5 are also entitled to a share in the suit property, they have produced several documents before the Trial Court and though notice was issued in the application Exh.5 on 01.08.2002 and written statement was filed by the respondent No.1, hearing of application Exh.5 could not be taken up nor any order was passed for about 8 months and in absence of any interim relief, the construction on the suit land was continued so as to render the suit infructuous and hence, the appellants have approached this Court by filing Appeal From Order No. 140/2003 and Civil Application No. 2730/2003 was also filed in the said Appeal From Order. This Court vide its order dated 02.05.2003 disposed of the said Appeal From Order and Civil Application by directing the learned Trial Judge to dispose of the application Exh.5 immediately within 15 days from the date of reopening of the Court after summer vacation. Pursuant to the direction of this Court, application Exh.5 was heard and disposed of on 27.06.2003 whereby the application Exh.5 was rejected.

8. It is this order which is under challenge in the present Appeal From Order.

9. Mr. A.J. Patel, learned advocate appearing for the appellants has submitted that the learned Trial Judge has committed an error in rejecting the application Exh.5 especially when there was voluminous documentary evidence produced on the record of the case to show that the appellant No.1 was managing the affairs of the HUF properties and the suit property was purchased in the name of respondent No.1 only because he was the eldest son of deceased Shri Dhulabhai, though the amount of consideration was paid by the deceased father of the appellant and respondent Nos.1, 4 & 5. Mr. Patel has further submitted that the learned Trial Judge has committed an error in ignoring the fraud committed by respondent No.1 and in not deciding application Exh.5 whereby directly the respondents were permitted to put up construction on the suit property and rendering the suit of the appellants infructuous. There was a detailed correspondence on the record of the Trial Court exchanged between deceased Dhulabhai and deceased Chandulal Muljibhai Parikh which clearly proved that the suit property was HUF property. When the suit property was purchased by deceased Dhulabhai, the respondent No.1 was a major and prosecuting his studies in a college and had no source of income at all. Deceased Dhulabhai had never partitioned the properties amongst his sons and, therefore, the suit property continued to be the HUF

property. Special Civil Suit No. 311 of 1999 filed by respondent Nos.2 & 3 against respondent No.1 and members of his family was a collusive suit, in as much as a consent decree was obtained in the said suit within 20 days with a view to deprive the appellants of their legitimate right of Co-ownership in the suit property. Since both the appellants were permanently residing at Bombay, they did not know about the institution and disposal of the aforesaid suit and immediately on coming to know about the collusive consent decree having been passed by the Trial Court, they have filed the present suit and also filed application Exh.5 for interim relief. The learned Trial Judge has committed an error in law by misinterpreting the provisions contained in Secs. 3 & 4 of the Benami Transactions (Prohibition) Act, 1988. The transaction in question was entered into by deceased Dhulabhai in the year 1962 for the benefit of the members of the HUF and the Provisions of the Benami Act came into force in the year 1988 and it was prospective in nature and, therefore, it did not apply to the transaction in question. Even if the Benami Act were to apply to the transaction in question, it would not make any difference in as much as a HUF is not subject to the rigours of the Benami Act. Mr. Patel has further submitted that the plea of benami was taken by the respondent No.1 and hence the burden lies on him to prove that the suit property was not purchased by the deceased father or out of the funds of the family. Mr. Patel relies on the decision of the Andhra Pradesh High Court in the case of PRADEEPKUMAR V/S. MAHAVEER PRASAD AND OTHERS, A.I.R. 2003 A.P. 107 wherein the property was purchased in the name of minor adopted son and he became coparcener of the undivided family due to adoption. The Court held that sub-section (3) of Section 4 of the Act carves out an exception to the Prohibition engrafted in sub-sections (1) and (2) thereof, in cases where the person in whose name the property is held is a coparcener in Hindu Undivided Family and the property is held for the benefit of the co-parceners in the family or that person is a trustee or other person standing in a fiduciary capacity. Mr. Patel has further relied on the decision of Allahabad High Court in the case of KULDEEP SHARMA AND OTHERS V/S. SATYENDRA KUMAR SHARMA AND OTHERS, A.I.R. 2001 ALL. 366, wherein it is held that the onus of proof heavily lie on the person who alleged a benami transaction to prove it. However, when the transaction is of the year 1936 no direct evidence would be expected and the conclusion would be arrived on the basis of the circumstance. Thus, where in a suit for partition, it was claimed that gift-deed under which suit house was gifted to defendant by his mother was invalid as she was

only a benami-deed in whose name the house was purchased by her husband, the ancestor of parties, and there was no direct evidence to show that she had any independent income or had stridhan and was proved that the money for purchase was withdrawn from the Provident Fund account of her husband and that the property was purchased in her name by her husband on apprehension of dispute and claim to property in future by his brothers, the concurrent findings by the courts that the Sale Deed in her favour was a benami transaction, can not be interfered with. Mr. Patel has, therefore, strongly urged that the leaned Trial Judge has committed a great error in rejecting the application Exh.5 despite the fact that the documents on record conclusively proved that the suit property was an ancestral property, that it was never partitioned, that it was managed by the appellant No.1 and that the respondent No.1 betrayed the confidence of the rest of the members of the HUF by trying to grab the suit property to the exclusion of the remaining members of the HUF.

10. Mr. Patel has also submitted that the Trial Court was not right in observing that the suit itself was barred by delay and laches as the delay occurred on account of the fact that the appellants did not know about the fraudulent transactions entered into by respondent No.1 with others behind the back of the appellants and as soon as they came to know about the passing of the consent decree in the suit filed by respondent Nos.2 & 3, the appellants have filed the suit before the Trial Court. There was no question of there being any laches as the laches presupposes that a person does not take any action notwithstanding the fact that he knew about the fact that his rights in a property were sought to be denied or altered by another person. As a matter of fact, the appellants have raised the dispute with respect to their rights in the suit property and hence, finding recorded by the Trial Court is absolutely perverse, dehors of any merits or substance and no prudent person could have reached to such conclusion. The order is, therefore, required to be quashed and set aside.

11. In addition to the above submissions, Mr. Patel has further submitted that there was no documentary evidence on record which shows that the property was purchased by the respondent No.1 out of his own sources. At the relevant time, the respondent No.1 was prosecuting his studies, there was no question of having any independent income of the respondent No.1 and, therefore, only presumption that could have been drawn was that the

suit property was purchased by deceased Shri Dhulabhai and property, therefore, became HUF property. Till this date, no conveyance deed has been executed by the respondent No.1 in favour of the respondent Nos.2 & 3. Only development agreement was executed and power of attorney was given to the respondent Nos.2 & 3. In this connection, he relied on the decision of the Hon'ble Supreme Court in the case of GOPAL KRISHNAJI KETKAR V/S. MOHAMED HAJI LATIF AND OTHERS, AIR 1968 SUPREME COURT 1413 wherein it is held that "even if the burden of proof does not lie on a party the Court may draw an adverse inference if he withholds important documents in his possession which can throw light on the facts at issue. The Court has further observed that it is not, in our opinion, a sound practice for those desiring to rely upon a certain state of facts to withhold from the Court the best evidence which is in their possession which could throw light upon the issues in controversy and to rely upon the abstract doctrine of onus of proof."

12. Mr. Patel has further submitted that the respondent Nos.2 & 3 are not the bonafide purchaser of the property as they know about the fact that title of the suit property was not clear and the appellants as well as respondent Nos.4 & 5 were the Co-owners of the suit properties and despite this knowledge, they entered into Banakhat and subsequently development agreement with the respondent No.1. In support of this submission, he relied on the decision of the Hon'ble Supreme Court in the case of GURBAKSH SINGH V/S. NIKKA SINGH AND ANOTHER, AIR 1963 S.C. 1917 wherein it is held that "whether the facts established beyond doubt that the purchaser had the knowledge that the title of his transferor was in dispute and he had taken a risk in purchasing the same it is not possible to hold that he had purchased the property in good faith."

13. Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of BINA MURLIDHAR HEMDEV AND OTHERS V/S. KANHAIYALAL LOKRAM HEMDEV AND OTHERS, AIR 1999 SCW 2186 wherein it is held that plea of bona fide purchaser is, in fact, not available, if a buyer purchases from a vendor property which in part belongs to another and not to seller, the 3rd party to the deed cannot be told that the buyer felt somebody had purportedly sold the right of the third party. Even so, we shall assume a plea of bona fide buyer without notice is permissible and examined whether the buyer had no notice of third party's rights in the property.

14. Mr. Patel has further relied on the decision of

the Andhra Pradesh High Court in the case of KOUTARAPU VENKATA CHENCHAYYA V/S. KOUTATARAPU RAMALINGAM AND OTHERS, AIR 1957 ANDHRA PRADESH 744 wherein it is held that "where there was no ancestral nucleus with the help of which the properties could have been acquired the onus is heavy on the plaintiff in a suit for partition to establish how the family came to own considerable joint family properties. Property acquired by members of a joint family by their joint labour in their joint business would be their joint family property, in the absence of a clear indication of a contrary intention to hold the property as co-owners, between themselves. The Court has further held that the properties were joint family properties and the manager was incompetent to dispose of the properties of his joint family by will. They passed by survivorship to his nephews, and were ancestral property in the hands of the latter."

15. Mr. Patel has further relied on the decision of the Allahabad High Court in the case of DARSHAN LAL AND OTHERS V/S. HARKESH SINGH AND OTHERS, AIR (88) 1951 ALLAHABAD 338 wherein it is held that "One Co-sharer cannot build upon joint land without the consent of the other co-sharers. This consent may be express or implied. Where constructions made by one co-sharer over the joint land, have been allowed to remain without challenge for a long time, the consent of the other co-sharer may be implied. But there can be no implication where the other co-sharers have expressly objected to the making of the constructions. It is also held in this case that where an alienee from a co-sharer in exclusive possession of joint land has made unauthorised constructions in spite of the objections of the other cosharer, the latter would be entitled to bring a suit for mandatory injunction for demolition of the constructions and to restore the land to its original condition. The mere fact that the suit is brought after 5 years of the completion of constructions cannot affect his right when there are no circumstances showing either that the plaintiff has waived his remedy or that it would be inequitable to give the relief asked by the plaintiff. The fact that there is a vacant space still available in the joint land out of which the plaintiff can be given an area equivalent to his share in a suit for partition is wholly irrelevant."

16. Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of SMT. RUKHMABAI V/S. LALA LAXMINARAYAN AND OTHERS, AIR 1960 SUPREME COURT 335 wherein it is held that "Though prima facie a document clearly expressing the intention to bring about

a division in status, it is open to a party to prove that the said document was a sham or a nominal one not intended to be acted upon but was conceived and executed for an ulterior purpose. But there is no presumption that any property, whether moveable or immoveable, held by a member of a joint Hindu family, is joint family property. The burden lies upon the person who asserts that a particular property is joint family property to establish that fact. But if he proves that there was sufficient joint family nucleus from and out of which the said property could have been acquired, the burden shifts to the member of the family setting up the claim that it is his personal property to establish that the said property has been acquired without any assistance from the joint family property."

17. Mr. Patel has further relied on the decision of the Hon'ble Supreme Court in the case of A. RAGHAVAMMA AND ANOTHER V/S. A. CHENCHAMMA AND ANOTHER, AIR 1964 SUPREME COURT 136 wherein it is held that "it is settled law that a member of a joint Hindu family can bring about his separation in status by a definite and unequivocal declaration of his intention to separate himself from the family and enjoy his share in severalty. The Hindu law texts, supports the proposition that severance in status is brought about by unilateral exercise of discretion. One cannot, however, declare or manifest his mental state in a vacuum. To declare is to make known, to assert to others. "Others" must necessarily be those affected by the said declaration. Therefore a member of a joint Hindu family seeking to separate himself from others will have to make known his intention to the other members of the family from whom he seeks to separate."

18. Mr. Patel has further relied on the decision of the Allahabad High Court in the case of MEHDI HASAN V/S. RAM KER, AIR 1982 ALLAHABAD 92 wherein it is held that "the mere fact that the sellers name was recorded in the revenue papers does not establish bonafide of purchaser. The buyer has to make proper inquiry before obtaining a Sale Deed. In absence of any such inquiry, the Sale Deed executed in favour of the buyer can certainly be assailed by the person aggrieved by the said transaction."

19. On the basis of the aforesaid authorities and the documentary evidence which were produced before the Trial Court as well as before this Court, Mr. Patel has strongly submitted that the Trial Court has committed a grave error in refusing the interim relief to the appellants and hence, the said order is required to be quashed and set aside and the interim relief as prayed

for is required to be granted.

20. Mr. J.R. Nanavati, learned Senior advocate appearing for the respondent Nos.2 & 3 has submitted that the learned Trial Judge, after proper consideration of the facts of the case and the documentary evidence produced, has passed order below application Exh.5 in Special Civil Suit No. 605 of 2003 and in his discretion has refused to grant interim injunction and rejected the application filed by the appellants. The said order should not be interfered with by this Court while exercising appellate power under O.43, R.1 of C.P.C. Mr. Nanavati has further submitted that the appellants have not produced the Sale Deed alleged to have been executed on 29.03.1961 between the original owner, namely, Shrimati Parvatiben Ingle with Chandulal Muljibhai Parikh and others in respect of the land in dispute which is the basis of the suit of the appellants and no other documents in fact show that the suit land purchased by the respondent No.1 was in fact purchased by the father of the respondent No.1. There was no evidence on record to show that all the heirs of the deceased Dhulabhai resided in a joint family. The appellants have failed to prove before the Trial Court that the respondent No.1 was a college going student, had no funds to purchase the land or that the deceased father Dhulabhai had funds of his own or of HUF from which the property was purchased in the name of his son, the respondent No.1. Mr. Nanavati has further submitted that the respondent No.1 has produced revenue record from 1961 onwards showing that the respondent No.1 and Chandulal were holders of the disputed land. The revenue record did not show that the land belongs to HUF or that it belongs to deceased Dhulabhai as contended by the appellants. The respondent No.1 has through out dealt with the property as if it was his own exclusive property. Though the appellants have relied on the proceedings before the Tenancy Court, the same are not relevant and the deposition of the witnesses are not relevant for the purpose of the present proceedings. Even in the said proceedings, the respondent No.1 has stated that the lands were purchased in the name of respondent No.1. Even the appellant No.1 has deposed before the Tenancy Court wherein it is revealed that he is not aware about any matter deposed by him and, therefore, the same is not relevant and cannot be relied upon for the purpose of present proceedings. After execution of the development agreement, the property was fully developed. Almost entire construction was over and the possession of the constructed portions, roughly 32 flats out of 36 flats have already been handed over to the respective buyers. About 80% construction

was over at the cost of Rs.1,59,38,875/-. The respondent Nos.2 & 3 have spent huge amount for acquiring the land. The respondent Nos.2 & 3 have also paid Rs.35 Lakhs to R.C. Parmar, the alleged tenant who litigated, Rs.24 Lakhs to one Girishbhai who also filed litigation and Rs.26 Lakhs to one D.P. Amin in addition to the sale price paid by the respondent Nos.2 & 3 to respondent No.1. The title clearance certificate was also obtained by the respondent Nos.2 & 3 and public notice was also given which was not answered by the appellants making claim in respect of the property. Even at the time of inauguration, publicity was made in the newspaper in 2001 and the appellants were well aware about the development right obtained by the respondent Nos.3 and since they have filed the suit before the Trial Court at a later stage after the respondent Nos.2 & 3 has spent large amount, it is not open for the appellants to claim any relief against the respondent Nos.2 & 3 and against all those persons who have subsequently acquired their right in the property, without joining them parties in the proceedings.

21. The appellants and respondent Nos.4 & 5 have become major in or around 1970 and Dhulabhai, the father died in 1986. There was joint family land in village Dhana in Anand Taluka which stood in the name of Dhulabhai and on the death of Dhulabhai, the said land was transferred in favour of all the heirs. Only the Nagarvada land and the lands in dispute belong to the respondent No.1 exclusively and hence, neither the appellants nor the respondent Nos.4 & 5 have made any claim for entering their name in case of Nagarvada land and the land in dispute. Nagarvada land was sold by the respondent No.1 to third party and till today the appellants were very well aware that the lands in dispute exclusively belong to the respondent No.1 and at this stage by filing suit before the Trial Court, the appellants' only intention was to harass and to irk out money from the respondent Nos. 2 & 3.

22. The third party interest is already created in the suit property and they are not joined as party before the Trial Court and hence, the appellants are not entitled to any interim injunction as prayed for. The form under Section 6 was filled in by the respondent No.1 and in the said form also, the respondent No.1 together with Chandulal Parikh and others were shown as Co-owners and in the said form, the said share of the respondent No.1 was shown as the exclusive share of the respondent No.1. The competent authority has passed an order in Case No. 361-Nagarwada dated 18.06.1990 and has allotted

one Unit only to respondent No.1 as the sole owner of the property. The transaction in question was bonafide as the appellants have never claimed any right, title or interest in respect of the land in dispute nor there was any interest shown in any document which is shown by the revenue record.

23. Mr. Nanavati has further submitted that pursuant to the consent decree dated 21.04.1999, the respondent Nos.2 & 3 have taken various steps for development and construction and necessary permissions and certificates have also been obtained from the authorities for development and construction. In this process, the respondent Nos.2 & 3 have spent huge amount and have transferred the land to the third parties and in this view of the matter, there was no question of granting any interim relief to the appellants. The Trial Court has, therefore, rightly refused to grant interim relief. In support of his submissions, Mr. Nanavati has relied on the decision of the Hon'ble Supreme Court in the case of MANJUNATH ANANDAPPA URF. SHIVAPPA HANSI V/S. TAMMANSA AND OTHERS, 2003 A.I.R. SCW 1830 wherein it is held that a Court of appeal should not ordinarily interfere with the discretion exercised by the Courts below. The Court has also quoted the relevant observations made by the Hon'ble Supreme Court in its earlier decision in the case of UTTAR PRADESH CO-OPERATIVE FEDERATION LTD. V/S. SUNDER BROS., A.I.R. 1967 S.C. 249, stating that it is ordinarily not open to the appellate Court to substitute its own exercise of discretion for that of the trial judge, but if it appears to the appellate Court that in exercising its discretion the trial court has acted unreasonably or capriciously or has ignored relevant facts then it would certainly be open to the appellate Court to interfere with the trial Court's exercise of discretion.

24. Mr. M.C. Bhatt, learned advocate appearing for the respondent No.1 has adopted the arguments of Mr. Nanavati. Over and above this, he has submitted that there was no question of suit property being HUF property. This question would arise only when the property is received either on succession or from the partition of Hindu Undivided Family. The property would be purchased out of HUF funds or the property has been blended by any of the Coparcener. None of these circumstances are present in the present case. There are ample evidences to show that the property was purchased by the respondent No.1 alongwith Shri Cnahdulal Parikh and it was in their exclusive possession all throughout. Even earlier decree which was passed was not challenged

nor it was the subject matter of the present suit.

25. Mr. Bhatt has further submitted that even as per the provisions contained in The Benami Transactions (Prohibition) Act, 1988, the appellants could not make any claim of partition in respect of suit property. Section 2 (a) defines benami transaction which means any transaction in which property is transferred to one person for a consideration paid or provided by another person. Section 4 of the Act talks of the prohibition of right to recover property held benami. Sub-section 4 (1) of the Act states that no suit, claim or action to enforce any right in respect of any property held benami against the person in whose name the property is held or against any other person shall lie by or on behalf of a person claiming to be the real owner of such property. Sub-section 3 of Section 4 does not apply to the facts of the present case as the property is neither held by the respondent No.1 as a coparcener in a Hindu Undivided Family nor the property is held for the benefit of other coparceners in the family.

26. Mr. Bhatt has further submitted that Benami Act would apply to the facts of the present case as the suit is filed after the Act has come into force. Mr. Bhatt relies on the decision of the Hon'ble Supreme Court in the case of R. RAJAGOPAL REDDY (DEAD) BY LRS. & ORS. V/S. PADMINI CHANDRASEKHARAN (DEAD) BY LRS. JT 1995(2) S.C. 667 wherein it is held that bar against filing, entertaining and admission of such suits would have become operative by June, 1988 and to that extent section 4(1) would take in its sweep even past benami transactions which were sought to be litigated upon after coming into force of the prohibitory provision of Section 4(1). The Court has further held that Section 4 of the Act is not a piece of declaratory or curative legislation. It creates substantive rights in favour of benamiders and destroys substantive rights of real owners who are parties to such transactions.

27. Mr. Bhatt has further relied on the decision of Madras High Court in the case of KUMARI BHAGYAVATHI V/S. SMT. LAKSHMIKANTHAMMAL (DECEASED) & OTHERS, A.I.R. 1993 MAD. 346, wherein the suit for partition and separate possession was filed by the plaintiff against her step mother benami for her deceased father. The suit property was purchased in the name of step mother of the plaintiff by deceased father of the plaintiff. The Court took the decision that the plaintiff can not lay any claim in view of section 4 of the Act to such house on the ground that it stood in the name of step mother benami for her

deceased father.

28. Mr. Bhatt has further submitted that the consent decree filed by the Court on 21.04.1999 was not challenged by the appellants and unless and until that decree is quashed and set aside by the competent Court, the appellants could not restrain the respondent Nos.2 & 3 from enjoying the fruits and benefits of that decree. In this connection, he relies on the decision of PEPSU HIGH COURT in the case of SHANTI PRASHAD AND OTHERS V/S. KUNJ LAL, A.I.R. 1953 PEPSU 151 wherein it is held that where no steps have been taken by a person to get a decree declared void or ineffective as against him, it has to be regarded to be perfectly valid against him and the decree-holder can get the benefit granted to him by the decree irrespective of the fact that the person was minor at the time. The plaintiffs could have challenged those decrees and have them set aside by alleging and proving fraud or slackness of their guardians but till that was done, they could not avoid their effect and deprive their decree holder of the rights acquired by him under those decrees.

29. Mr. Bhatt has, therefore, vehemently urged that the appellants do not deserve for any interim relief since the trial court has rightly refused interim injunction, the appeal from order deserves to be dismissed.

30. I have heard at length the learned advocates appearing for the respective parties. I have minutely examined the papers and documents produced before the Court. Even the Sale-Deed under which the disputed property was purchased in the name of the respondent No.1 and late Shri Chandulal Parikh was not produced by the present appellants before the trial Court, was called for and taken on record. The authorities cited before me are duly considered. After giving my anxious thoughts and careful considerations to the submissions of the parties and the authorities referred to and relied upon before me, I am of the prima facie opinion that the appellants are not entitled to any interim relief during the pendency of the suit and the learned trial Judge has not committed any error, either in law or on facts, while rejecting application Exh.5 for interim relief.

31. There are certain undisputed facts which are emerged from the record produced before the Court and from the pleadings of the parties. The suit property was purchased on 29.03.1961 in the joint names of the respondent No.1 and late Shri Chandulal Parikh. Revenue

record showed the name of the respondent No.1 and the said Shri Chandulal Parikh right from 1961 onwards. The father of the appellants as well as the respondent Nos.1, 4 and 5 died in 1986 and thereafter, certain properties were transferred in the names of the legal heirs. However, the disputed property continued to be in the name of respondent No.1. Under the Urban Land (Ceiling & Regulation) Act, in the Form No.6, the disputed property was shown in the name of the respondent No.1 and by an order dated 18.06.1990, the competent authority has granted only one unit to the respondent No.1. As per the Memorandum of Understanding arrived at between the respondent No.1 and the legal heirs of late Shri Chandulal Parikh on 25.05.1990, one portion towards western side was treated as the property of the respondent No.1. The respondent No.1 alongwith his family members executed agreement to sell with respondent Nos.2 & 3 on 19.01.1998. Special Civil Suit No. 311 of 1999 was filed by the respondents Nos.2 & 3 against the respondent No.1 and consent decree was passed on 21.04.1999. With the help of power of Attorney and Development Agreement, construction was made, huge amount was spent and third parties rights were created. On these facts, it is not just and proper to draw an inference that the suit property was HUF property and that the respondent No.1 has played fraud in transferring the suit property and that several documents, orders, proceedings are not genuine and mere eye-wash. This Court finds it difficult to draw such an inference at this stage of the matter. Hence, relying on the decision of the Hon'ble Supreme Court in the case of MANJUNATH ANANDAPPA (SUPRA) , this Court being Court of appeal does not want to interfere with the discretion exercised by the Trial Court.

32. Even otherwise, defence raised by the respondent No.1 with regard to benami transaction can not be brushed aside. The transaction pertaining to the suit property is of March, 1961. Benami Transactions (Prohibition) Act, came into force in 1988. The appellants filed the Special Civil Suit No. 605 of 2002 in 2002. This suit is, therefore, prima facie appears to be barred by virtue of the Provisions contained in Section 4 (1) and (2) of the Act. In absence of any concrete or positive evidence, the exception carved out in sub-section (3) cannot be pressed into service at this juncture, taking the view that the property held by the respondent No.1, being co-parcener of the joint family, is the joint family property for the benefit of all the co-parceners. This question can be gone into during the course of trial. However, no case is made out for interim relief

on this ground.

33. The decisions relied upon by Mr. Patel would not be of much assistance to the appellant. The decision of the Hon'ble Supreme Court in the case of GOPAL KRISHNAJI KETKAR (SUPRA) is not applicable to the facts of the present case as the respondent No.1 has not stated anywhere that the sale deed was executed in favour of the respondent Nos.2 & 3. It is their case all throughout that initially agreement to sell was executed and, thereafter, Development Agreement was entered into and on receipt of full consideration, possession with irrevocable power of attorney was given.

34. The decision of the Hon'ble Supreme Court in the case of GURBAKSH SINGH V/S. NIKKA SINGH AND ANOTHER is also not applicable to the facts of the present case as admittedly, the suit property is standing in the name of respondent No.1 right from 1961. No dispute was ever raised about title of property till the agreement to sell was entered into, suit was filed and consent decree was filed. Thus, it cannot be said that the respondent Nos.2 & 3 are not the bonafide purchasers of the suit property. For the same reason, the decision of the Hon'ble Supreme Court in the case of HINA MURLIDHAR HEMDEV AND OTHERS V/S. KANHAIYALAL LOKRAM HEMDEV AND OTHERS would not render any assistance to the appellants as the suit property does not belong to any one except the respondent No.1. There was no other co-sharer of the suit property and hence the reliance placed on the decision of Allahabad High Court in the case of DARSHAN LAL AND OTHERS V/S. HARKESH SINGH AND OTHERS (SUPRA) is also unwarranted and uncalled for. Other decisions cited by Mr. Patel would also not strengthen the appellant's case for the simple reason that there was no clear, cojent or unequivocal evidence which prima facie satisfies the conscience of the Court that the suit property belonged to joint family or it was purchased out of the funds of the family.

35. Considering the entire facts and circumstances of the case and having regard to the legal position concerning the point in issue, this Court is of the view that the impugned order passed by the Trial Court below an application Exh.5 does not call for any interference in this Appeal From Order. Accordingly, this Appeal From Order is dismissed. Interim relief granted earlier is vacated.

36. At this stage, Mr. A.J. Patel, the learned advocate appearing for the appellants requested to

continue the interim relief granted earlier by this Court for the period of six weeks so as to enable the appellants to approach the higher forum. Mr. Bhatt and Mr. Nanavati, learned advocates appearing for the respondents Nos.1, 2 & 3 respectively have strongly objected to the extension of interim relief. After considering their submissions on this issue, the interim relief granted earlier is extended for four weeks from today.

37. With this observation, this Appeal From Order as well as Civil Application both are disposed of accordingly, without any order as to costs.

[K.A. PUJ, J.]

#Savariya#

*****